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Volume 33
Issue 1 *Fall 1983*

Article 3

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Beth Z. Margulies

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Recommended Citation

Beth Z. Margulies, *Employees' Pipe Dream of Free Choice in Representation: Effectuated or Eradicated? (The Midwest Piping Doctrine Revised)* , 33 DePaul L. Rev. 75 (1983)
Available at: https://via.library.depaul.edu/law-review/vol33/iss1/3

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EMPLOYEES' PIPE DREAM OF FREE CHOICE IN REPRESENTATION: EFFECTUATED OR ERADICATED? (THE *MIDWEST PIPING* DOCTRINE REVISED)

*Beth Z. Margulies**

For nearly four decades after its 1945 decision in *Midwest Piping and Supply Co.*,[1] the National Labor Relations Board ("the Board") steadfastly imposed a duty of strict neutrality upon employers faced with recognition claims from rival unions.[2] This duty, recognized as the *Midwest Piping* doctrine, precluded such an employer from recognizing or negotiating a collective bargaining agreement with any of the rival unions in an initial organizing setting until a Board election resolved the representation conflict.[3] The *Midwest Piping* doctrine was triggered whenever "a real question concerning the representation of the employees" existed.[4]

Throughout this period, the Board gradually expanded the scope of the *Midwest Piping* doctrine, becoming quite liberal in finding the existence of

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* Graduate Fellow and LL.M. candidate, Yale University Law School, 1984. J.D., University of Bridgeport School of Law, 1983; B.A., McGill University, 1976. The author wishes to thank Julius Getman, Richard Litvin and Jerome Wenig for their helpful guidance and comments.

1. 63 N.L.R.B. 1060 (1945). For a complete discussion of *Midwest Piping*, see *infra* text accompanying notes 12-23.

2. The duty of neutrality, formally adopted in *Midwest Piping*, was foreshadowed in an earlier Board decision, Elastic Stop Nut Corp., 51 N.L.R.B. 694 (1943), which involved an initial organizing situation when no petitions were filed. The Board held that the act of the employer in signing a contract with the Employees Benevolent Association after the rival International Association of Machinists made a claim of majority support and sought recognition constituted unlawful assistance in violation of his obligation to remain neutral. The Board also found evidence of employer domination in support of recognition but clearly grounded the obligation of neutrality and the § 8(a)(1) violation on employer awareness of the rival's activities, and not on the other unlawful acts of preference. *Id.* at 702.

The Board, immediately prior to *Elastic Stop Nut*, also required employers to remain neutral with respect to statements made to employees during the period preceding representation elections. The Supreme Court struck down this requirement on first amendment grounds in NLRB v. Virginia Elec. & Power Co., 314 U.S. 469, 477 (1941), and permitted employers to express their views on labor policies or problems. This protection extended to statements of employer preference for one union over another. *Virginia Electric*, however, does not cast doubt on the *Midwest Piping* doctrine. There is a distinction between employer statements of preference and an employer contracting with one of two rival unions. Even strongly worded statements of employer preference do not foreclose the possibility that employees will choose another union. However, once an employer actually contracts with one union in an initial organizing situation, he precludes the possibility of employees making a contrary choice. Permitting timely recognition would give the employer a powerful tool for selecting a favored union.

3. *Midwest Piping*, 63 N.L.R.B. at 1070.

4. *Id.* The term "real question concerning representation" was derived from language found in § 9(c)(1) of the National Labor Relations Act, which authorizes the Board to order an election "[i]f . . . such a question of representation exists." National Labor Relations Act § 9(c)(1), 29 U.S.C. § 159(c)(1) (1976).

a real question concerning representation.[5] As part of this extension, the duty of neutrality was applied, in an incumbent union situation, to prohibit the employer from negotiating a new contract with the incumbent once a real question concerning representation arose.[6]

Two recent Board decisions, however, drastically restrict the scope of the *Midwest Piping* doctrine. *Bruckner Nursing Home*[7] held that in rival union, initial organizing situations, only the filing of an election petition establishes a real question concerning representation. Thus, until such a petition is filed, an employer is free to recognize and negotiate with a union representing an uncoerced, unassisted majority of employees.[8] *RCA Del Caribe, Inc.*[9] held that an employer in an incumbent union situation, faced with a representation petition filed by a rival union, may not withdraw from bargaining with the incumbent merely because of the filed petition. The incumbent union thus retains its preferred status in dealing with the employer. One effect of these decisions is to allow (or, in the incumbent union context, obligate) an employer to engage in collective bargaining without awaiting a Board certified election. More importantly, however, *Bruckner* and *RCA* frustrate the right of employees, guaranteed by the National Labor Relations Act ("the Act"),[10] to select the representative of their choosing.

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5. *See infra* text accompanying notes 25-36.

6. *See* Shea Chem. Corp., 121 N.L.R.B. 1027 (1958). The Board's treatment of the incumbent situation prior to *Shea* had been inconsistent. The Board's first statement, appearing in William Penn Broadcasting Co., 93 N.L.R.B. 1104, 1105 (1951), advocated the duty of neutrality for incumbent union cases. Three years later, the Board retreated from this position in William D. Gibson Co., 110 N.L.R.B. 660 (1954), reasoning that to require withdrawal from bargaining would stifle negotiations and hinder stability in industrial relations, thereby defeating the primary objective of the Act. *Id.* at 662 (citing Colgate-Palmolive-Peet Co. v. NLRB, 338 U.S. 355 (1949)). By attempting to avoid disruption in collective bargaining relations, the *Gibson* Board believed that its decision would not interfere with individual free choice of representation because if a rival union were elected, any collective bargaining agreement it reached with the employer would supersede the incumbent's agreement. *Id.* In *Shea,* decided just four years after *Gibson,* the Board insisted on applying the duty of strict neutrality to prevent negotiation of a new contract with an incumbent, stating that "[t]emporary postponement of bargaining relations is not too great a price to pay for the stabilizing effects of an orderly selection of bargaining representatives in a free atmosphere." 121 N.L.R.B. at 1038. The Board feared that continued bargaining without an election would establish an inference of employer approval which could sway employees. *But see infra* note 150 for a discussion of the contrary view.

The Board in *Shea* emphasized that this duty of neutrality did not relieve the employer from administering the terms of existing contracts or processing grievances arising under those contracts. *Shea,* 121 N.L.R.B. at 1029.

7. Bruckner Nursing Home, 262 N.L.R.B. 955 (1982).

8. *Id.* at 957-58. Throughout this article, the phrases "petition," "election petition" and "representation petition" will be used interchangeably in referring to petitions filed to obtain Board certification under § 9 of the Act.

9. RCA Del Caribe, Inc., 262 N.L.R.B. 963 (1982).

10. Section 7 of the National Labor Relations Act states in relevant part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

National Labor Relations Act § 7, 29 U.S.C. § 157 (1976).

The decision to permit recognition in the rival union context requires a careful balancing of the different policies of the Act. The employees' right to choose their representative freely, safeguarded by the Board's election processes, must be weighed against the need to expedite commencement of a labor-management relationship in order to establish and maintain industrial stability.[11] Under *Bruckner*, an employer has a significantly greater opportunity to contract with the union he favors, precluding a Board supervised election and thus a contrary employee selection. As a result, the Board has favored the latter policy at the expense of the former. As this article will illustrate, that preference is both unwise and unwarranted.

Part I of this article addresses the development and expansion of the *Midwest Piping* doctrine and notes conflicts that arose between the Board and some courts of appeals. Part II sets forth the *Bruckner* and *RCA* decisions and the Board's justifications for them. Part III presents a critical assessment of those decisions and their justifications in light of the purposes of the National Labor Relations Act.

I. DEVELOPMENT OF THE *MIDWEST PIPING* DOCTRINE

A. Midwest Piping and Supply Co.[12]

From 1937, employees at three plants operated by Midwest Piping and Supply Co., Inc., were represented by the Steamfitters union under consecutive "members only" contracts.[13] As the last such agreement was about to expire in late 1943, the opposing Steelworkers union won representative status at one plant pursuant to a Board-supervised election.[14] Both unions continued vigorous campaigning at the remaining plants. Each filed representation petitions with the Board, and each made a demand for recognition to the employer.[15] While the Steelworkers union would not comply with the company's request to substantiate its claim of majority status, the Steamfitters union submitted membership cards demonstrating majority support; the company then entered into a collective bargaining agreement with the Steam-

11. The controversy over whether to permit recognition was not confined to the Board and the courts; the controversy was further reflected in the writings of eminent legal scholars. *See, e.g.*, Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38 (1964); Getman, *The* Midwest Piping *Doctrine: An Example of the Need for Reappraisal of Labor Board Dogma*, 31 U. CHI. L. REV. 292 (1964) (assumption that recognition has coercive effect is erroneous).

12. 63 N.L.R.B. 1060 (1945).

13. *Id.* at 1065. A "members only" contract is one in which the employer grants recognition only to employees who have voluntarily joined the union; it does not cover all employees in the bargaining unit. The validity of such contracts has been recognized for many years. *See* Retail Clerks Int'l Ass'n v. Lion Dry Goods, 369 U.S. 17 (1962); Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938). In a rival union situation, an employer who wishes to grant a "members only" contract to one union is required to grant similar contracts to each union so that he does not render illegal support to a favored union in violation of § 8(a)(2) of the Act. *See* Sunbeam Corp., 99 N.L.R.B. 546 (1952).

14. 63 N.L.R.B. at 1065.

15. *Id.* at 1068 & n.11.

fitters union.[16] The Steelworkers union subsequently filed a complaint with the Board, alleging a violation of section 8(a)(1) of the Act.[17]

The Board held that the employer's execution of a contract with the Steamfitters, occurring when the employer knew of the representation petitions pending before the Board and was aware of the competing union's campaign activities and demand for recognition, violated section 8(a)(1) of the Act. The Board reasoned that the employer's conduct accorded "unwarranted prestige" to, and "encourag[ed] membership" in, the Steamfitters union, in disregard of the employees' section 7 rights.[18] Thus, the Board established the doctrine that when a real question concerning representation exists, an employer must remain neutral until the Board resolves the representation question through its certification procedures.[19]

The Board offered three justifications for its *Midwest Piping* decision. First, it noted that Congress invested the Board with exclusive jurisdiction to resolve real questions concerning representation when petitions have been filed.[20] Second, the Board regarded membership cards as inherently unreliable indicators of employee choice.[21] Finally, the Board reasoned that the overriding purpose of the Act—the promotion of industrial peace and stability through protecting employees' section 7 rights—mandated employer neutrality during representation disputes.[22] With respect to this last justification, the Board perceived that a grant of recognition without the benefit of election processes could lead the employees supporting the unrecognized union to feel that their right to select their representative was not adequately safeguarded. This, in turn, could lead to the application of economic pressure by the employees, thereby interfering with the employer's business and disrupting industrial peace.[23]

B. Establishing a Real Question Concerning Representation: The Trigger of the Duty of Neutrality

In the years following *Midwest Piping,* the Board and the courts of appeals agreed that the *Midwest Piping* doctrine applied only when a real question concerning representation existed. A controversy arose, however, as to when a real question existed.[24] The Board viewed situations which could lead

16. *Id.* at 1068-69.

17. Section 8(a)(1) of the Act states in relevant part:

> (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7 to choose their own representatives].

National Labor Relations Act § 8(a)(1), 29 U.S.C. § 158(a)(1) (1976).

18. 63 N.L.R.B. at 1071.

19. *Id.* at 1070.

20. *Id.*

21. *Id.* at 1070 n.13.

22. *Id.* at 1070.

23. *See id.* ("such conduct by the [employer] . . . leads to those very labor disputes affecting commerce which the Board's administrative procedure is designed to prevent").

24. *See infra* notes 30-36 and accompanying text.

to the invocation of Board election processes under section 9(c) of the Act as creating such a question.[25] By insisting on the use of Board election machinery to protect employees' rights to choose freely their own representative, the Board denigrated the reliability of authorization cards.[26] Many courts of appeals, on the other hand, perceived the existence of a real question to turn on whether there was a satisfactory showing of majority support. Those courts held that cards could establish clear proof of majority support when checked by an impartial body, so that no real question existed and the duty of neutrality did not attach.[27]

The Board gradually expanded the doctrine's reach by broadening the category of events which would trigger the duty of neutrality.[28] Initially, the Board appeared to take the view that the filing of a petition by a rival union triggered the doctrine.[29] Subsequent Board decisions did not rely upon the filing of petitions to raise a real question concerning representation; the *Midwest Piping* doctrine was applied when claims of majority status or demands for recognition were made, although petitions were not filed.[30] Some

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25. *See* Getman, *supra* note 11, at 293-94.

26. *See infra* note 110 and accompanying text.

27. *See infra* notes 98-100 and accompanying text.

28. Each of the Board's justifications in *Midwest Piping* for the neutrality requirement calls for a different triggering event. If one focuses on the facts of the case—both unions filed petitions, invoking exclusive Board jurisdiction—the expected outcome would be that neutrality would not be required until a petition is filed. A narrow reading of this sort would also apply the doctrine only to initial organizing situations and not to incumbent situations. If one focuses on the justification that membership cards are inherently unreliable, however, a more expansive interpretation follows; then the doctrine would apply in two situations. It would apply, of course, when petitions have been filed. In addition, it would apply when no petitions have been filed but a card demand has been made, either by both unions, or by one union if the employer was aware of the rival's claims. Finally, reliance on the Act's purpose of safeguarding industrial stability invites an even broader application. Card demands, or demands of any sort, would not be necessary to trigger the doctrine; any time an employer was aware of more than one union's efforts to organize his employees, strict neutrality would be required.

A feature common to each of the three justifications, however, is that each reinforces the underlying premise that employees' free choice in representation should be protected by the Board's election process. The Board election machinery assures employees of a secret ballot. Disregarding cards as being unreliable indicators of employee preference also protects free choice by preventing peer pressure and by establishing a time period, known to all, in which unions have the opportunity to muster adequate support and employees can make an informed choice. Lastly, the exercise of employee free choice will enhance industrial stability.

29. Some courts of appeals, however, held that the duty of neutrality did not come into play until the Board ordered an election. These courts would not enforce Board neutrality orders when petitions had been filed but elections had not yet been ordered. One commentator has noted that the Board and judicial approaches led to disparate results based on an unnecessarily fine distinction. *See* Getman, *supra* note 11, at 295-96 (whether Board has ordered an election does not resolve the issue of majority strength). *Compare* St. Louis Indep. Packing Co. v. NLRB, 291 F.2d 700 (7th Cir. 1961) (enforcing Board order when election ordered), *with* NLRB v. Swift & Co., 294 F.2d 285 (3d Cir. 1961) (denying enforcement when petitions filed and election hearings held, but election not yet ordered).

30. *See, e.g.*, Pittsburgh Valve Co., 114 N.L.R.B. 193 (1955) (existence of claim triggers *Midwest Piping* doctrine), *rev'd on other grounds*, 234 F.2d 565 (4th Cir. 1956); I. Spiewak & Sons, 71 N.L.R.B. 770 (1946) (request for bargaining triggered duty of neutrality).

courts of appeals agreed that the absence of a petition did not eliminate the possibility that a real question existed. These courts, however, held that an employer's duty to remain neutral turned on the demonstration of majority support. An employer thus was allowed to recognize one of several competing unions if that union was able to establish its majority status.[31] Moreover, some courts insisted that even a petition, by itself, was not sufficient to create a real question concerning representation when proof of majority status was presented.[32]

Ultimately, the Board even dispensed with the requirement that claims or demands be made by all of the interested unions. In the most ambitious expansion of the *Midwest Piping* doctrine,[33] the Board in *Intalco Aluminum Corp.*[34] held that a real question concerning representation existed merely by virtue of the employer's knowledge of other unions' organizational activities when he made a recognition agreement and subsequently signed a collective bargaining agreement with one union. Although the court did not disagree with the Board's view that an employer's knowledge of rival union activities could establish a real question, it again looked to whether the latter union in fact enjoyed majority support. The court enforced the Board's order because no cross-check opportunity, necessary to verify a claim of majority status, had been given to the other unions.[35] Thus, the Board

31. *See, e.g.*, NLRB v. Burke Oldsmobile, 288 F.2d 14 (2d Cir. 1961) (court agreed with Board that a real question concerning representation existed because there was not a showing of majority status; handcount expression of majority support was tainted by employer's presence); NLRB v. Indianapolis Newspapers, 210 F.2d 501 (7th Cir. 1954) (court denied enforcement of Board order because there was indisputable proof of majority support).

32. *See* cases cited *infra* note 99 and accompanying text. The only time the Board would find that a filed petition was insufficient to establish a real question was when one of the two unions was effectively defunct so that no real question existed at the time the contract was executed, Ensher, Alexander & Barsoom, Inc., 74 N.L.R.B. 1443 (1947); or when the bargaining unit was inappropriate, so that the Board dismissed the petition, William Penn Broadcasting Co., 93 N.L.R.B. 1104 (1951); or when the Board dismissed the petition as untimely filed—i.e., petitions filed during an election bar period, *see* Playskool, Inc., 195 N.L.R.B. 560 (1972), or during a contract bar period, *see* Leonard Wholesale Meats, Inc., 136 N.L.R.B. 1000 (1962).

33. Some courts adhered to an equally expansive reading of the doctrine's reach by enforcing Board orders and applying the doctrine in the period pending court review of election certifications. *See* NLRB v. Kearney & Trecker Corp., 237 F.2d 416 (7th Cir. 1956) (employer in good faith was convinced that election was tainted due to coercive union tactics in bitter campaign rivalry); NLRB v. National Container Corp., 211 F.2d 525 (2d Cir. 1954) (union filed objections to election). These courts held that the doctrine imposed neutrality until the collective bargaining representative was fully determined under the Act's procedures. *See Kearney,* 237 F.2d at 421; *National Container,* 211 F.2d at 535.

34. 169 N.L.R.B. 1034 (1968), *enforced in part and set aside in part,* 417 F.2d 36 (9th Cir. 1969).

35. Intalco Aluminum Corp., 417 F.2d 36, 40 (9th Cir. 1969). *But see* Playskool, Inc. v. NLRB, 477 F.2d 66 (7th Cir. 1973), in which the court indicated that no real question concerning representation existed when a union had not renewed its request for recognition since it lost the last election, even though the employer might have been aware of its continued campaign efforts. *Id.* at 72. The court denied enforcement of the Board order and permitted the employer to recognize the union that had presented a verified card majority without participation of the rival union in the card check. *Id.*

gradually expanded the applicability of the *Midwest Piping* doctrine while the courts frequently narrowed the scope established by the Board by refusing to enforce its orders. This continuing conflict was in part responsible for the Board's decisions in *Bruckner* and *RCA*.[36]

C. *The Remedy for Violations of the* Midwest Piping *Doctrine*

Paradoxically, the Board's preoccupation with protecting employee free choice sometimes caused it to fashion a remedy that seemed inconsistent with its *Midwest Piping* objective. The usual remedy was unobjectionable; it was simply to order the employer[37] to cease and desist from recognizing a union and to stop giving effect to any agreement reached with that union until Board certification.[38] In incumbent union situations, the employer was required to cease bargaining with the incumbent union for a new contract, but was able to continue administering the collective bargaining agreement and processing grievances arising under that agreement.[39]

In certain instances, however, the Board issued a bargaining order. It did so when an employer unlawfully assisted and supported the union he favored.[40] Yet the use of a bargaining order in a rival union situation had the effect of allowing the Board to choose the employees' representative.[41]

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36. *See* Bruckner Nursing Home, 262 N.L.R.B. 955, 957 (1982).

37. After the enactment of the Taft-Hartley Amendments, Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. §§ 141-188 (1976), the Board also found unions which sought employer recognition while a real question concerning representation existed to be engaged in unfair labor practices in violation of §§ 8(b)(1)A and 8(b)2 of the Act. The Board ordered such unions to cease and desist from enforcing the contracts, from accepting recognition until after certification, and from attempting to cause the companies to discriminate against their employees by entering into agreements. *See, e.g.,* Air Master Corp., 142 N.L.R.B. 181 (1963) (cease and desist order issued); Duralite Co., 132 N.L.R.B. 425 (1961) (same); Jersey Contracting Corp., 112 N.L.R.B. 660 (1955) (same).

38. Also, the employer usually was required to post notices for 60 days, informing employees of the situation, and to notify the Regional Director of his compliance. *See* Shea Chem. Corp., 121 N.L.R.B. 1027, 1030 (1958).

39. *See id.* at 1029.

40. *See, e.g.,* Flex Plastics, Inc., 262 N.L.R.B. 651 (1982) (employer encouraged employees to circumvent union); Lyman Steel Co., 249 N.L.R.B. 296 (1980); Ralco Sewing Indus., 243 N.L.R.B. 438 (1979) (employer fired members of disfavored union); Riviera Manor Nursing Home, 186 N.L.R.B. 806 (1970) (employer promised benefits for not selecting union), *remanded,* 200 N.L.R.B. 333 (1972), *enforcement denied,* 539 F.2d 714 (7th Cir. 1976); Brescome Distrib., 179 N.L.R.B. 787 (1969) (improper meetings with employees), *enforced,* 452 F.2d 1312 (D.C. Cir. 1971). The Board issued the bargaining orders based on NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). For a discussion of *Gissel,* see *infra* text accompanying notes 121-23. Interestingly, the Board in a later *Riviera Manor* decision pointed out that the use of a bargaining order is inherently inconsistent in situations where petitions have been filed because the filing of petitions presupposes the presence of a real question concerning representation, and a bargaining order necessarily rests on the absence of such a question. The Board usually dismisses representation petitions upon issuing a bargaining order. *See* Riviera Manor Nursing Home, 220 N.L.R.B. 124, 125 & n.9 (1975) (no bargaining order issued) (citing International Hod Carriers, 135 N.L.R.B. 1153, 1166 n.24 (1962)).

41. In Oil Transport Co., 182 N.L.R.B. 1016 (1970), the Board distinguished between relying on a card majority in single union situations as opposed to rival union situations, in order

Thus, if the Board's justification for the *Midwest Piping* doctrine is premised on the fact that a pending petition invokes exclusive Board jurisdiction so that employees may choose their own representative, the use of a bargaining order in those situations is inconsistent with that justification.[42] Although it is true that the doctrine was established to preclude the employer from making that choice, the Board does not safeguard employees' choice any better by making the decision itself instead of holding an election. There is no way to discover the employees' true preference by way of a bargaining order, especially when employers have given unlawful assistance, employees have signed both unions' membership cards, and there has been no cross-union card check. Because the employees may not really want the "unassisted" union, surely the Board ought to weigh this risk against the section 8(a)(2) findings before issuing a bargaining order.

Sometimes the Board escaped the paradox that resulted from holding a bargaining order applicable to a rival union situation by stating that the facts did not present a *Midwest Piping* doctrine problem at all.[43] In those instances, the Board reasoned that the employer was not faced with rival claims because he had unlawfully sponsored and assisted the recognized union in obtaining authorization cards *initially*.

II. RECENT BOARD LIMITATIONS ON THE *MIDWEST PIPING* DOCTRINE

Over time, the Board became dissatisfied with the refusal of some courts of appeals to enforce its *Midwest Piping* decisions.[44] For at least one year prior to the *Bruckner* and *RCA* rulings, the Board in rival union situations declined to address *Midwest Piping* doctrine questions when it was able to dispose of the cases on other grounds.[45] It is reasonable to infer that the

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to determine whether a *Gissel* bargaining order was proper. Tensions are far greater in rival union campaigns and employees are subjected to more pressure, so dependence on cards is unnecessary and unwise in those instances. The election machinery remains the most reliable method for verifying employee preference. *Id.* (quoting Note, *The Employer's Duty of Neutrality in the Rival Union Situation: Administrative and Judicial Application of the* Midwest Piping *Doctrine,* 111 U. PA. L. REV. 930, 947 (1963) [hereinafter cited as Note, *Employer's Duty of Neutrality*]); *see also* Inter-Island Resorts, Ltd., 201 N.L.R.B. 139 (1973) (Board ordered new election rather than issue bargaining order), *enforcement denied,* 507 F.2d 411 (9th Cir. 1974).

42. The one situation in which a bargaining order might be justified may be seen in NLRB v. Engelhorn & Sons, 134 F.2d 553 (3rd Cir. 1943), where an employer reached a collective bargaining agreement with one union while aware that another union had filed a petition. The agreement was held invalid and an election was held; the rival union won the election and was certified. Proof of majority status therefore was established in the election, thus justifying the issuance of a bargaining order consistent with the *Midwest Piping* doctrine. *Id.* at 558.

43. *See, e.g.,* Cas Walker's Cash Stores, 249 N.L.R.B. 316 (1980); Sturgeon Electric Co., 166 N.L.R.B. 210 (1967).

44. *See* Bruckner Nursing Home, 262 N.L.R.B. 955, 957 (1982).

45. *See, e.g.,* Classic Indus., 254 N.L.R.B. 1149 (1981). The Board in *Classic Industries* found that the employer had violated § 8(a)(2) of the Act by rendering unlawful assistance in the formation of a "Shop Committee," and by negotiating and signing a collective bargaining agreement with the Committee. *Id.* The Board held that the employer's recognition of the unlawfully assisted union was a per se violation of the Act, and found it "unnecessary" to

Board did so because it was reconsidering its position on the neutrality issue addressed by the expanded *Midwest Piping* doctrine.[46] When the Board finally decided *Bruckner* and *RCA,* the result was to curtail that doctrine significantly.

A. Bruckner Nursing Home[47]

Bruckner is the Board's reevaluation of the *Midwest Piping* doctrine in an initial organizing situation involving rival unions. The decision greatly undercuts the expansion of that doctrine by reverting to the Board's original *Midwest Piping* position: in an initial organizing situation, the duty of neutrality attaches only upon the filing of an election petition by one or more of the rival unions.[48] Thus, *Bruckner* stands for the proposition that, in such circumstances, the filing of a petition determines the existence of a real question concerning representation.[49]

In the spring of 1974, two unions, Local 144, Hotel, Hospital, Nursing Home & Allied Health Services Union ("Local 144"), and Local 1115, Joint Board, Nursing Home and Hospital Employees Division ("Local 1115"), began organizing employees at the employer's nursing home facility. By early September of 1974, Local 144 claimed majority status based on signed authorization cards and set a date for verification of the cards.[50] Local 1115, in turn, informed the employer by mailgram of its organizational activities and requested that he not recognize any other labor organization. Local 1115 also filed unfair labor practice charges against both the employer and Local 144.[51] No election petitions, however, were filed by either union.[52]

Verification of the cards indicated that Local 144 represented a majority of the employees.[53] Despite a request for recognition by Local 144, the

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reach the administrative law judge's conclusion that the employer had violated his duty of neutrality under the *Midwest Piping* doctrine by bargaining with the Committee in the face of a rival union demand for recognition. *Id.; see also* Monfort of Colorado, 256 N.L.R.B. 612, 613 (1981) (Board declined to address *Midwest Piping* issue because of "overwhelming evidence" of unlawful employer assistance of one union in violation of § 8(a)(2) of the Act).

46. The Board, at the time it decided *Classic Industries* and *Monfort,* had already accepted *RCA* for review. *See* RCA Del Caribe, 262 N.L.R.B. 963 (1982). Both *Bruckner* and *RCA* presented pure *Midwest Piping* situations, for no other unlawful employer assistance was found in *Bruckner* (the Regional Director dismissed the unfair labor practice charges, 262 N.L.R.B. at 955), and none was alleged in *RCA.*

47. 262 N.L.R.B. 955 (1982).

48. *Id.* at 956-57.

49. *See id.* at 957.

50. *Id.* at 955.

51. *Id.* Local 1115 alleged that the employer and the union had interfered with the employees' § 7 rights to select the union of their choice, the employer in violation of § 8(a)(1) and Local 144 in violation of § 8(b)(1)(A). The charges were subsequently dismissed by the Regional Director. *Id.*

52. *Id.*

53. *Id.* The card count showed that Local 144 obtained valid authorization cards from 80 to 90% of the 125 employees. *Id.* Local 1115 had procured only 10 cards, and three of the 10 were from employees who had also signed cards for Local 144. *Id.* at 960.

employer refused to recognize or negotiate with the union pending the outcome of the unfair labor practice charges. In November of 1974, the Regional Director dismissed those charges. By that time, Local 1115 had acquired thirteen more cards.[54] Subsequently, the employer negotiated and executed a collective bargaining agreement with Local 144. In response, Local 1115 filed further charges with the Board against the employer.[55] In light of the employer's knowledge of Local 1115's organizational activities and signed authorization cards, the administrative law judge concluded that the employer's execution of a collective bargaining agreement with Local 144 constituted unlawful assistance to the latter union in violation of section 8(a)(2) of the National Labor Relations Act.[56]

The Board dismissed the charges against the employer and held that an employer in an initial organizing situation, faced with claims from rival unions with no petitions filed, may recognize a union representing an uncoerced, unassisted majority of his employees.[57] Only upon the filing of an election petition will the duty of strict employer neutrality and nonrecognition attach. Once notified of the filing of a petition, however, the employer must cease recognition of any of the rival unions.[58]

The Board offered two justifications for its decision in *Bruckner*. First was the need to reconcile the policy interests of the Act—employee freedom in the selection of bargaining representatives and facilitation of collective bargaining—giving "equal consideration to each of those interests in the light of industrial reality."[59] The Board concluded that the expanded *Midwest Piping* doctrine failed to strike the proper balance, and as a result, hindered the collective bargaining process and frustrated employee free choice.[60] The Board reasoned, however, that such a "clearly defined rule of conduct" as laid down in *Bruckner* would "encourage both employee free choice and industrial stability."[61] According to the Board, if a union cannot muster the support of at least thirty percent of the employees (the amount necessary to file a petition), it should not be able to prevent the employer from

54. *Id.* at 960. Of the 13 employees who signed cards for Local 1115, nine also signed cards for Local 144. *Id.* Because two of the employees who had signed the earlier cards for Local 1115 left Bruckner's employ before the unfair labor practice charges were dismissed on November 29, Local 1115 possessed only 21 current cards on that date. *Id.*

55. Local 1115 alleged violations of §§ 8(a)(1), 8(a)(2), 8(a)(3), 8(b)(1)(A), and 8(b)(2). The Board dismissed the entire complaint. *Id.* at 959.

56. *Id.* at 955.

57. *Id.* at 958.

58. *Id.* In order to file a petition, a union must demonstrate the support of at least 30% of the employees in the bargaining unit. *Id.* at 957 n.14.

59. *Id.* at 957.

60. *Id.* For a discussion of the balancing of these two interests, see *supra* notes 87-92 and accompanying text.

61. 262 N.L.R.B. at 957. Deeming the filing of a petition to be the operative event which triggers the duty of neutrality, the Board opined that this provides employers, employees, and unions with clear standards for recognizing the existence of a colorable claim by a rival union. *Id.*

recognizing a rival union which *can* demonstrate majority support.[62] Allowing the employer to recognize the rival in such circumstances, rather than leaving him to speculate as to whether a real question exists, expedites the collective bargaining process and encourages industrial stability.[63] The Board thought that requiring neutrality in this situation would result in delay which would actually frustrate employee free choice. Conversely, the Board noted that requiring the employer to remain neutral when a union has demonstrated "substantial support" by way of a valid petition encourages employee free choice and avoids undue employer influence.[64]

The second rationale offered by the Board was that its decision solved the dual authorization cards problem, which arises when employees solicited by rival unions sign cards for both unions.[65] The Board retracted its position in *Midwest Piping* that authorization cards in a rival union context are inherently unreliable indicators of employee choice. Instead, the *Bruckner* Board held that, although the problem of dual authorization cards in a rival union setting must be considered, the existence of such cards alone would not cause the Board to refuse to allow the employer to rely on cards.[66] The Board concluded, however, that a union's showing of the thirty percent support necessary for a petition cast sufficient doubt upon the rival's claim of majority support to invoke the Board's election machinery for resolution of the competing claims.[67]

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62. *Id.* Although the opinion is not clear as to the effect of a petition filed by an employer, this, too, should trigger the duty of neutrality. If the employer's petition did not trigger the duty to withhold recognition, then the result would be to foreclose the possibility that the duty could ever be invoked once an employer filed a petition. This is so because the Board would not entertain a union's petition (the triggering event) after it had already ordered an election based on the employer's petition. Thus, the employer would remain free to recognize one union until the election outcome resolved the issue. The importance of neutrality in this context may be demonstrated as follows. Assume that an employer, faced with recognition claims based on authorization cards from rival unions *X* and *Y*, files a petition to resolve the dispute. Union *X* then proceeds to exert economic pressure upon the employer in order to gain recognition. If the employer were not required to remain neutral, he could recognize union *X* and greatly undercut union *Y*'s ability to win the election. If the employer favored union *Y*, he could engage in "hard" bargaining with union *X*, thereby encouraging employees to choose union *Y* at election time. In either event, a non-neutral employer could significantly affect his employees' choice.

63. *Id.*

64. *Id.* at 958.

65. *Id.*

66. *Id.* The Board relied on Linden Lumber Div. v. NLRB, 419 U.S. 301 (1974), and NLRB v. Gissel Packing Co., 395 U.S. 575 (1969), as examples of the Supreme Court's approval of reliance on authorization cards in other organizational settings. 262 N.L.R.B. at 958. These two cases are factually dissimilar to the situation in *Bruckner*, however, because both cases involved single union situations only. *See Linden Lumber*, 419 U.S. at 302-03; *Gissel*, 395 U.S. at 580, 587.

67. 262 N.L.R.B. at 958.

B. RCA Del Caribe, Inc.[68]

In *RCA*, the Board reversed its long-standing requirement of employer neutrality when an incumbent union is challenged by a rival union.[69] In 1974, the employer and the incumbent union, International Brotherhood of Electrical Workers (IBEW), were operating under a collective bargaining agreement. As the agreement drew to a close, negotiations for a new agreement commenced. Those negotiations were unsuccessful, and a strike ensued over the bargaining demands.[70]

During the strike, the rival Union Independiente de Empleados de Lineas Aereas de Puerto Rico ("Union Independiente") filed an election petition.[71] After receiving notice of the petition, the employer refused any further recognition of or negotiation with the incumbent IBEW. Approximately one month later, the IBEW submitted to the employer the bona fide signatures of a majority of the employees, which authorized the IBEW to continue as their representative.[72] Those employees also signed a petition requesting the Board to dismiss the election petition, thereby reaffirming their desire to be represented by the IBEW.[73] The employer reopened negotiations with the IBEW and they arrived at a new agreement which ended the strike.[74] The General Counsel for the Board issued a complaint against the employer, alleging a violation of the duty of neutrality established in *Midwest Piping*.[75]

The Board dismissed the complaint, holding that an employer in an incumbent union situation cannot withdraw from bargaining with the incumbent merely upon the filing of an election petition by a rival union.[76] In fact, the Board stated that the employer's failure to continue recognizing and bargaining with the incumbent results in a violation of section 8(a)(5) of the Act.[77] If the rival union wins the subsequent election, however, any

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68. 262 N.L.R.B. 963 (1982).

69. *Id.* at 964-65.

70. *Id.* at 963-64.

71. *Id.* at 964. When *RCA* was decided, the petition had been pending for seven years. When the Board announced its decision, the Union Independiente withdrew its petition. As a result, the election was never held and the IBEW remains the bargaining unit representative at RCA Del Caribe, Inc. Telephone interview with NLRB Regional Director for Puerto Rico (December 23, 1983).

72. 262 N.L.R.B. at 964. The IBEW had obtained voluntary signatures from 157 employees, a majority of the 227 bargaining unit employees. The employer verified the signatures by comparing them with employer records. *Id.* However, this method of verification does not include any prophylactic measure against dual authorization cards. Furthermore, the *RCA* Board clearly indicated that it will not require an incumbent union to reaffirm its majority status by submitting cards after a petition has been filed. *Id.* at 966 n.16.

73. *Id.* at 964.

74. *Id.* at 963.

75. *Id.* at 964.

76. *Id.* at 965.

77. *Id.* Section 8(a)(5) states as follows:

> (a) It shall be an unfair labor practice for an employer . . .
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

National Labor Relations Act § 8(a)(5), 29 U.S.C. § 158(a)(5) (1976).

agreement reached between the employer and the incumbent will be void.[78]

The Board relied, in part, on a line of cases which held that an incumbent union in a nonrival situation enjoys a presumption of majority status.[79] In order to afford the incumbent the same advantage in a rival union setting, the *RCA* Board extended that principle to the situation when an election petition has been filed by a rival union.[80] The Board rejected its prior reasoning in *Shea Chemical Corp.*,[81] an extension of the *Midwest Piping* doctrine, that prohibiting an employer from negotiating a new contract with the incumbent was necessarily the best means of ensuring neutrality. Rather, the *RCA* Board perceived withdrawal from bargaining as potentially signalling to the employees the employer's rejection of the incumbent and preference for the rival. Continued negotiations with the incumbent, the Board concluded, were less likely to signal employer preference.[82] In addition, the Board saw continued bargaining as enabling the employer to react to changing economic conditions which require immediate response.[83]

The Board regarded the policies of the Act—to ensure employees' free choice and to facilitate collective bargaining relations—as complementary elements in attaining industrial stability.[84] Because the Act does not elevate one policy above the other, it is reasonable to infer that they are to be considered of equal importance. The Board in *RCA* did not offer a contrary view. However, the Board viewed *Midwest Piping* as protecting employee free choice to the detriment of stability, thereby elevating the former over the latter.[85] It seems clear that the Board in *RCA* anticipated returning the two policies to parity.[86]

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78. *RCA*, 262 N.L.R.B. at 966.

79. *See, e.g.*, Brooks v. NLRB, 348 U.S. 96, 98 (1954) (absent "unusual circumstances," Board certification of union must be honored for one year from the date of certification); United States Gypsum Co., 157 N.L.R.B. 652 (1966) (nonrebuttable presumption of majority status exists for one year post-certification, while a rebuttable presumption of majority status exists after that time).

80. 262 N.L.R.B. at 965.

81. 121 N.L.R.B. 1027 (1958).

82. 262 N.L.R.B. at 965.

83. *Id.*

84. *Id.*

85. *Id.*

86. To facilitate industrial stability, the Board applied its reasoning from *RCA*—a filed petition is not evidence of a real question concerning representation in an incumbent union setting—in a subsequent decision. In Dresser Indus., 264 N.L.R.B. No. 145, 111 L.R.R.M. 1436 (BNA) (1982), which overruled its decision in Teleautograph Corp., 199 N.L.R.B. 892 (1972), the Board held that the filing of a decertification petition is not evidence of a real question concerning representation. Instead, according to the Board, the filing of a petition is merely evidence of minority dissatisfaction. 111 L.R.R.M. at 1437.

In order to withdraw from bargaining with an incumbent union after the first year of certification, the employer, under *Dresser* and *RCA*, now has the burden of proving that a good faith, reasonable doubt supported by objective facts exists as to the incumbent's lack of majority status. Such a showing will overcome the rebuttable presumption of majority status which inures to the incumbent after its first year as the bargaining representative. *Dresser*, 111 L.R.R.M. at 1437; *RCA*, 262 N.L.R.B. at 965 n.13.

III. CRITIQUE OF THE BOARD'S LIMITATIONS ON THE SCOPE OF THE *MIDWEST PIPING* DOCTRINE

A. Policies of the Act Reconciled

The primary objective of the National Labor Relations Act is to achieve industrial stability so as not to obstruct commerce.[87] The framers of the Act recognized that certain practices of labor organizations and employers led to industrial strife, and that elimination of those practices and the corresponding creation of certain rights were necessary to ensure peaceful labor relations.[88] One particular concern was the inequality of bargaining power between employers and employees. The Act attempted to restore equality of bargaining power between employers and employees, and thereby achieve industrial stability, through two complementary policies: protecting employees' freedom to choose their own representatives and hastening the commencement of collective bargaining relations.[89]

The Act does not elevate stability through collective bargaining over preservation of employee free choice as its principal policy. In *Bruckner* and *RCA*, however, the Board appears to have done precisely that, despite its stated intention to give the two interests equal consideration.[90] It criticized *Midwest Piping* as failing to strike a proper balance between these interests by protecting employee free choice at the expense of expediting collective bargaining. The Board further criticized *Midwest Piping* as failing in fact to promote employee free choice. The Board maintained that, in a situation free of any unlawful employer activity other than a *Midwest Piping* doctrine violation, free choice would be either delayed or stifled permanently under *Midwest Piping*. According to the Board, the employees' uncoerced and unassisted choice under such circumstances, shown by authorization cards, would not be effectuated while election certification was pending. The Board thus asserted that *Bruckner* and *RCA* struck a proper balance between the two

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The requirement for establishing a reasonable doubt was set forth in Celanese Corp., 95 N.L.R.B. 664, 673 (1951), and adopted in *Dresser*. Although *Dresser* held that a decertification petition alone does not create a reasonable doubt, it suggested that a petition presented directly to the employer, demonstrating a showing of majority support for decertification, would create such a doubt. 111 L.R.R.M. at 1437; *cf.* Automated Business Sys., 205 N.L.R.B. 532 (1973) (Board permitted employer to infer loss of majority support from submission of cards by majority of employees and representations of the petitioners' attorney). By virtue of the ease with which a card majority can be obtained, however, an employer may withdraw from bargaining with little difficulty, thereby frustrating *RCA*'s attempt to preserve the status quo.

87. National Labor Relations Act § 1, 29 U.S.C. § 151 (1976); *see also* Colgate-Palmolive-Peet Co. v. NLRB, 338 U.S. 355, 362 (1949) (primary objective of Congress in enacting the National Labor Relations Act was to assure stability in labor relations).

88. 29 U.S.C. § 151 (1976).

89. *See id.*

90. *See Bruckner*, 262 N.L.R.B. at 957; *see also* Novak Logging Co., 119 N.L.R.B. 1573 (1958), in which the Board explicitly rejected the trial examiner's attempt to reconcile these interests in accordance with the courts of appeals which had in the past denied enforcement of Board orders. The Board reserved to itself the authority to balance the Act's policies, absent a Supreme Court pronouncement on the issue. *Id.* at 1575-76.

policies of the Act.[91] On the contrary, however, these decisions appear to unduly favor the encouragement of expedited collective bargaining at a cost to employee free choice. The Board's rationale is erroneous in those initial organizing situations when, between the time a union makes a demand for recognition based on authorization cards and the time the election is held, intervening solicitations by a rival union cause changes in union allegiance. In those instances, it is of equal or greater probability that the employees' latter decision most accurately reflects their true choice.

It is true that, under *Midwest Piping,* requiring neutrality when cards are an accurate indicator of employee sentiment would frustrate employee free choice and impede collective bargaining. Under those circumstances, neither policy would be effectuated. But the *Midwest Piping* Board must have considered this possibility and determined that the occasions when cards accurately reflect employee desires are simply too infrequent to be significant. *Bruckner* implicitly rejected this position and instead found it necessary to further both policies by permitting recognition. On the other hand, when cards do not accurately reflect employees' desires, the *Midwest Piping* doctrine protected employee free choice by requiring use of the more trustworthy election machinery to determine the true representative. The only expense with respect to the policy of facilitating collective bargaining relations was to *immediate* collective bargaining; the long-term interest in promoting meaningful collective bargaining was protected. *Bruckner,* by permitting recognition when cards do not accurately reflect employees' choice, frustrates free choice and impedes meaningful collective bargaining—all for the dubious gain of immediacy.

B. The Problem of Enforceability

The *Bruckner* and *RCA* decisions acknowledged that many courts of appeals consistently denied enforcement of Board neutrality orders.[92] Consequently, the Board fashioned its new policies in large part to accommodate the opinions expressed by those courts.[93] Yet fundamental flaws exist with the Board's attempted accommodation. The doctrinal change effected by the Board is unlikely to achieve the desired result in many situations. Apart from this failure, the deference shown by the Board to the courts was uncalled for.

Under the *Midwest Piping* doctrine, the Board imposed a duty of neutrality whenever a real question concerning representation existed.[94] As the doctrine expanded, the Board found such questions to exist even when no petitions were filed.[95] Some courts of appeals enforced Board neutrality orders

91. *Bruckner,* 262 N.L.R.B. at 956-57.

92. *See id.* at 957 ("as often as the Board reaffirmed its adherence to the . . . 'modified' *Midwest Piping* doctrine, . . . the courts of appeals refused to enforce our decisions").

93. *Id.*

94. *See supra* note 19 and accompanying text.

95. *See Bruckner,* 262 N.L.R.B. at 957, and cases cited therein; *see also supra* notes 30 and 34 and accompanying text.

in cases when no petitions were filed,[96] as well as when petitions were filed.[97]

Other courts, however, declined to accept the Board's view of when real questions concerning representation existed, and thus denied enforcement of Board orders.[98] The basis for the disagreement between the Board (and the courts that accepted its interpretation) and those courts that did not defer to the Board stemmed from opposing views regarding the reliability of authorization cards as a basis for determining majority support in rival union situations. The Board deemed such cards to be unreliable and insisted upon elections as the proper means of selecting bargaining representatives. Conversely, courts that denied enforcement of Board orders relied upon authorization cards as indisputable proof of majority status. Those courts held that when such support was shown, no real question concerning representation existed, and thus the duty of neutrality did not attach.

Although the Board in *Bruckner* and *RCA* attempted to tailor the *Midwest Piping* doctrine so as to gain consistent court enforcement of its orders, the Board failed to achieve this objective. For example, *Bruckner* made the filing of a petition the operative event to invoke the duty of neutrality in an initial organizing situation. However, a number of pre-*Bruckner* courts of appeals decisions did not draw this distinction. Rather, these courts denied enforcement of Board neutrality orders not because of the absence of a petition, but because there was clear proof of majority status by one union; petitions had been filed in some cases[99] but not in others.[100] Therefore, *Bruckner* did not eliminate the possibility that the courts which denied enforcement of Board orders when petitions were filed will continue to deny enforcement, because their view of when a real question concerning representation exists still differs from the Board's.

A similar result is likely to occur in incumbent situations. The Board in *RCA* required continued bargaining with an incumbent, even after a rival union files a petition. Yet prior decisions in some circuits indicate that courts might well deny enforcement of Board orders in this context, permitting employer recognition of a rival union based upon a showing of majority support. The Third and Seventh Circuits have allowed employers to recognize

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96. *See, e.g.,* NLRB v. Western Commercial Transp., Inc., 487 F.2d 332 (5th Cir. 1974), in which the court enforced the Board's order even though a clear showing of majority support was demonstrated.

97. *See, e.g.,* American Can Co. v. NLRB, 535 F.2d 180 (2d Cir. 1976) (court expressly refused to endorse Board or contrary court views); NLRB v. Allied Food Distrib., 421 F.2d 188 (5th Cir. 1969) (court accepted Board determination that real question existed).

98. *See, e.g.,* NLRB v. Inter-Island Resorts, Ltd., 507 F.2d 411 (9th Cir. 1974); Playskool, Inc. v. NLRB, 477 F.2d 66 (7th Cir. 1973); American Bread Co. v. NLRB, 411 F.2d 147 (6th Cir. 1969).

99. *See* NLRB v. Inter-Island Resorts, Ltd., 507 F.2d 411 (9th Cir. 1974); American Bread Co. v. NLRB, 411 F.2d 147 (6th Cir. 1969); Modine Mfg. Co. v. NLRB, 453 F.2d 292 (8th Cir. 1971); Cleaver Brooks Mfg. v. NLRB, 264 F.2d 637 (7th Cir.), *cert. denied,* 361 U.S. 817 (1959); NLRB v. Standard Steel Spring Co., 180 F.2d 942 (6th Cir. 1950).

100. *See* Playskool, Inc. v. NLRB, 477 F.2d 66 (7th Cir. 1973); Pittsburgh Valve Co. v. NLRB, 234 F.2d 565 (4th Cir. 1956) (petition dismissed).

rival unions, upon clear proof of majority status, when no valid petitions were filed.[101] In *St. Louis Independent Packing Co. v. NLRB,* the Seventh Circuit stated that, even after an election is ordered, a "clear showing of majority representation by evidence of a substantial nature" would demonstrate that no real question concerning representation existed.[102] Similarly, the Third Circuit in *Suburban Transit Corp. v. NLRB* stated that when a union has garnered majority support without illegal employer assistance, "its recognition by the employer . . . [is] precisely the sort of cooperation that it is the policy of the Act to foster."[103] Although the *Suburban Transit* and *St. Louis* cases each involved recognition of an incumbent, there is no basis in the opinions to presume that the same results would not obtain with respect to rival unions after elections had been ordered. As these examples reveal, the change in the *Midwest Piping* doctrine wrought by *Bruckner* and *RCA* does not ensure enforcement of future Board orders. Contrary to the Board's objective, the enforceability problem remains unresolved.

Moreover, the primary reponsibility for determining the existence of a real question concerning representation rests with the Board and not with the courts of appeals. The standard of review, established by statute and maintained in Supreme Court decision, requires enforcement of Board orders if the Board's findings of fact are "supported by substantial evidence on the record considered as a whole."[104] Further, the Supreme Court has acknowledged that this standard is not to detract from the Board's function as an agency equipped with special knowledge; the Board's findings are those of an expert, the findings of the courts of appeals are not.[105]

Thus, when the Board and a court maintain conflicting views, the court may not deny enforcement merely because its view is different than that espoused by the Board.[106] It is the judiciary that is to defer to the Board,

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101. *See* NLRB v. Air Master Corp., 339 F.2d 553 (3d Cir. 1964); NLRB v. Indianapolis Newspapers, 210 F.2d 501 (7th Cir. 1954).

102. 291 F.2d 700, 704 (7th Cir. 1961).

103. 499 F.2d 78, 86 (3d Cir. 1974). There the court held that the filing of a decertification petition, even when supported by authorization cards from 30% of the bargaining unit employees, did not prevent the employer from bargaining with the incumbent union. *Id.* at 82. The court relied on *Swift,* which required that an election be ordered. *Id.* at 83. (No election had yet been ordered in *Suburban.*)

104. National Labor Relations Act § 10(e)-(f), 29 U.S.C. § 160(e)-(f) (1976); *see also* Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1950) (citing to § 10(e) of the Act).

105. *Universal Camera,* 340 U.S. at 488.

106. *Id.* Even if the existence of a real question concerning representation is perceived as a mixed question of law and fact, rather than a question of fact alone, the courts' deference should remain unchanged. The Supreme Court has held in recent years that the Board is entitled to a significant degree of deference with respect to questions of law involving interpretations of the Act. *See, e.g.,* Ford Motor Co. v. NLRB, 441 U.S. 488, 497 (1979) (when the Board's construction of the Act is "reasonably defensible, it should not be rejected merely because the courts might prefer another view of the statute"). Moreover, even when courts have denied enforcement of Board orders, based on a different definition of when a real question concerning representation exists, they have followed the *Universal Camera* standard.

and not the reverse. Yet it appears that some courts, by holding that cards are reliable criteria for ascertaining majority support, in effect substituted their judgment for the contrary view of the Board. The Board's willingness in *Bruckner* and *RCA* to accede to this substitution was an unwise exercise of its discretion in light of the impact on employee free choice.

C. *Unreliability of Cards*

The Board in *Bruckner* offered its decision as a solution to the problems of dual authorization cards.[107] Closer examination of the Board's reasoning, however, reveals the weakness of this position. Contrary to the *Bruckner* Board's position, it appears that the expanded *Midwest Piping* doctrine better resolved the problem of dual authorization cards by requiring strict neutrality, thus rendering the inherently unreliable cards an ineffective means of obtaining recognition.

Bruckner acknowledged that employees in rival union settings often sign cards for more than one union.[108] Nevertheless, the Board permitted an employer, absent a petition, to recognize one of the rival unions based on authorization cards. As a result of *Bruckner,* the duty of neutrality now attaches only after a petition has been filed in an initial organizing, rival union context. This holding was premised on the Board's view that cards are "less reliable" indicators of a union's majority status when a rival union has filed a petition than when no petition has been filed.[109] The Board's position implies that before a petition is filed, cards are not sufficiently reliable indicators of employee support to establish the existence of a real question concerning representation, but that they are reliable enough to establish majority status and thus allow the employer to recognize a union.

The fallacy of this reasoning is clear, however, for if cards are sufficiently reliable to establish majority support, a fortiori they should be sufficiently reliable to establish the existence of a real question concerning majority support. The *Bruckner* Board's selective reliance on authorization cards is especially questionable in light of its admission that there is a high potential for inaccuracy when dual cards are present and when authorization cards are used as an indicator of employee preference.[110] One is hard pressed to

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See, e.g., Iowa Beef Packers v. NLRB, 331 F.2d 176, 181 (8th Cir. 1964) (relying on § 10(e)); NLRB v. Trosch, 321 F.2d 692, 695 (4th Cir. 1963) (relying on *Universal Camera*); NLRB v. Indianapolis Newspapers, 210 F.2d 501, 503 (7th Cir. 1954) (only question is whether facts "substantially support" Board's conclusion).

107. Bruckner Nursing Home, 262 N.L.R.B. 955, 958 (1982).

108. *Id.* Dual cards may reflect either shifting employee sentiment as to choice of representative, or merely a general desire for unionization, without expression of a preference for one organization over another.

109. *Id.*

110. *Id.; see, e.g.*, District 65, Distributive Workers of Am. v. NLRB, 593 F.2d 1155 (D.C. Cir. 1978). *District 65* illustrates the unreliability of authorization cards in a rival union context when dual card signatures prevail. The employer in *District 65* unlawfully assisted and recognized Teamsters Local 806, despite his knowledge that two other rival unions had made demands for recognition. The employer did not verify the Teamsters' cards, although the rival unions

see how the *Bruckner* decision resolves this problem. In contrast, *Midwest Piping*'s more extensive duty of neutrality offers a more realistic answer to the dual card problem.

The *Midwest Piping* Board fully recognized cards as an unreliable factor in assessing majority support:

> [I]t is well known that membership cards obtained during the heat of rival organizing campaigns . . . do not necessarily reflect the ultimate choice of a bargaining representative; indeed, the extent of dual membership among the employees during periods of intense organizing activity is an important unknown factor affecting a determination of majority status, which can best be resolved by a secret ballot among the employees.[111]

Midwest Piping's position of nonreliance upon cards as an expression of majority support, and its dependence upon the more reliable election process thus more fully preserves employee free choice.

The dual card situation is only one of many card problems that recur in rival union settings, all of which cast doubt on the reliability of authorization cards. Other problems include employer intimidation of employees into signing authorization cards for one union over another,[112] union intimidation of employees into signing authorization cards for one union over another,[113] falsification of signatures, and predating of signed cards.[114] The Supreme Court has acknowledged the tremendous effect of peer pressure in a single union setting by stating:

> Whatever his true intentions, an employee who signs a recognition slip prior to an election is indicating to other workers that he supports the union. His outward manifestation of support must often serve as a useful tool in the union's hands to convince other employees to vote for the union, if only because many employees respect their co-workers' views on the unionization issue.[115]

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had offered to verify their claims. A statistical breakdown of signatures revealed that majority support could not feasibly exist for any of the unions: of 408 employees, "88 had signed only with Local 806, 16 only with Local 888, 96 only with District 65, 43 with both 806 and 888, 66 with 806 and 65, 20 with 888 and 65, 36 with all three unions and 43 with none." *Id.* at 1162 n.16.

111. Midwest Piping and Supply Co., 63 N.L.R.B. 1060, 1070 n.13 (1945); *see also* Novak Logging Co., 119 N.L.R.B. 1573, 1575 n.7 (1958) (approving language of *Midwest Piping*).

112. *Midwest Piping,* 63 N.L.R.B. at 1071.

113. Although *Bruckner* focused on employer interference, unions are equally capable of coercing employees in their choice of representative. *See, e.g.,* Note, *Union Authorization Cards,* 75 YALE L.J. 805, 827 (1966) ("A union organizing by means of authorization cards, is in at least as effective a position to coerce as is an employer in a secret ballot campaign.").

114. *See, e.g.,* Playskool, Inc., 195 N.L.R.B. 560 (1972), *enforcement denied,* 477 F.2d 66 (7th Cir. 1973).

115. NLRB v. Savair Mfg. Co., 414 U.S. 270, 277 (1973). Employees also may sign authorization cards without actually reflecting their true sentiments. *See, e.g.,* NLRB v. S.S. Logan Packing Co., 386 F.2d 562, 565 n.12 (4th Cir. 1967) (some cards are signed to "get the union off [our] back[s]").

Unions also use, to advantage, the fact that employees are influenced by how others vote. Therefore, even in single union situations, the manner in which authorization cards are obtained may render them unacceptable. *See* Marie Phillips, Inc., 178 N.L.R.B. 340 (1969) (although

The tendency of most persons to seek peer approval and avoid nonconformist stances thus contributes to the unreliability of authorization cards. As the Fourth Circuit noted in *NLRB v. S.S. Logan Packing Co.*,[116] this untrustworthiness is enhanced when cards are signed before employees are exposed to contrary views. Employees who change their minds after such exposure are unlikely to withdraw their cards;[117] consequently, cards collected over a period of time bear little assurance of validity.[118] Although *Logan Packing* involved only a single union requesting recognition based on cards, the same concerns exist in a rival union situation. For example, employees may sign cards for a union that has been organizing for several months. When another union begins campaigning and offers a more favorable stance, inducing a change of viewpoint by some of the early signers, the stale cards may no longer accurately reflect the employees' desires. (This problem is distinct from the problem of dual signatures because the employees who have altered their views may not yet have signed authorization cards for the latter union.) Therefore, it may well be that cards obtained by the first union to organize do not accurately reflect the employees' choice at the time a demand for recognition is made by that union. By requiring that recognition await an election, the Board would ensure that all employees have time to make an informed choice.

The *Bruckner* Board viewed its new postion as consistent with and supported by the Supreme Court's decisions in *NLRB v. Gissel Packing Co.*[119] and *Linden Lumber Division v. NLRB.*[120] However, these cases do not lend support to the legitimacy of recognition based on cards in a rival union context, because both cases involved only single union settings. In *Gissel,* the court delineated two instances when a bargaining order, and not an election, would be an appropriate remedy for employer unfair labor practices: exceptional cases involving outrageous and pervasive unlawful conduct,[121] and less serious cases involving less pervasive practices, when the union achieved a card majority at some point and when the Board concluded that the extensiveness of the unlawful conduct had a "tendency to undermine majority strength and impede the election processes."[122] The presence of

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Board presumed that employees express their individual opinions, it allowed for invalidation of cards when the signers relied on union misrepresentations as to union strength), *enforced sub nom.* Local 153, ILGWU v. NLRB, 443 F.2d 667 (D.C. Cir. 1970), *cert. denied,* 403 U.S. 905 (1971); *accord* NLRB v. Roney Plaza Apts., 597 F.2d 1046, 1053 n.16 (5th Cir. 1979); Medline Indus. v. NLRB, 593 F.2d 788 (7th Cir. 1979); Schwarzenbach-Huber Co. v. NLRB, 408 F.2d 236, 241 (2d Cir.), *cert. denied,* 396 U.S. 960 (1969); NLRB v. Dan Howard Mfg. Co., 390 F.2d 304 (7th Cir. 1968); NLRB v. H. Rohtstein and Co., 266 F.2d 407, 409 (1st Cir. 1959). These cases illustrate just how easily employees sign cards that may not actually reflect their true sentiments. If there is a legitimate reason to distrust cards in single union situations, surely there is greater reason to justify distrust in rival union situations.

116. 386 F.2d 562, 566 (4th Cir. 1967).

117. *Id.*

118. *Id.*

119. 395 U.S. 575 (1969).

120. 419 U.S. 301 (1974).

121. *Gissel,* 395 U.S. at 613-14.

122. *Id.* at 614.

employer unfair labor practices in a single union situation undermines the effectiveness of the election machinery from the outset. In that case, the Board must rely on cards, because it has no other means to gauge employee support. In rival union situations when employer unfair labor practices are not present, there is no reason to fear that an election will be tainted. Thus, there is no need to rely on cards. Moreover, the Supreme Court has stated that, absent employer unfair labor practices, the Board's election machinery is the preferred means of discerning employee sentiment.[123] Therefore, the Supreme Court's acceptance of cards as indicating majority support in single union situations with attendant unfair labor practices cannot justify reliance on cards to establish majority support in rival union situations without unfair labor practices.

The Supreme Court in *Linden Lumber Division v. NLRB*[124] only partially supported the Board's reliance on cards as indicators of employee sentiment. In *Linden Lumber,* the Court permitted the employer the option of recognizing a union on the basis of cards in a single union situation. There is likely to be a significant difference between allowing the option in a single union situation and allowing it in a rival union situation, because "an employer is more likely to favor one union over another than to favor one [union] over none."[125] Furthermore, *Linden Lumber* in fact appears to support the notion that cards are unreliable as indicators of employee preference. The *Linden Lumber* Court, by permitting an employer to refuse a recognition request supported by cards, acknowledged that an employer may have "rational good faith grounds for distrusting authorization cards in a given situation."[126]

The Board in *Bruckner* and *RCA* also failed to require employers to observe a procedural formality which would, at least to some degree, help guarantee that employee free choice is maintained. Neither decision insisted that an employer afford the unrecognized rival union an opportunity to submit its cards for cross-checking at the time the recognized union's cards are verified. Rather, the Board merely cautioned the employer to verify the signatures submitted by the recognized union, so as not to recognize erroneously a minority union.[127] Yet the Board previously had held that an independent verification check of employees' signatures against the employer's payroll list was insufficient to establish a majority claim because it failed to protect adequately against forgeries, predatings, and the possibility of dual signatures.[128] On that occasion, the Board observed that majority support

123. *Id.* at 602.

124. 419 U.S. 301 (1974).

125. Getman, *supra* note 11, at 304 n.45.

126. *Linden Lumber,* 419 U.S. at 306. The Court placed the burden on the union to file a petition in order to establish representative status once the employer refused recognition. *Id.* at 309.

127. Such recognition, even if inadvertent, would violate § 8(a)(2) of the Act. *Bruckner,* 262 N.L.R.B. at 957 n.13 (citing ILGWU v. NLRB, 366 U.S. 731 (1961)).

128. Playskool, Inc., 195 N.L.R.B. at 561 n.8 (1972), *enforcement denied,* 477 F.2d 66 (7th Cir. 1973).

could have been determined if the employer had provided for participation by both unions in the card verification, which would have helped reduce the dual card problem.[129] The *Bruckner-RCA* Board offered no explanation for omitting this prophylactic measure.

The Supreme Court ruled in *NLRB v. Jones & Laughlin Steel Corp.*[130] that "the right of employees to self-organization . . . is often an essential condition of industrial peace,"[131] and that "collective action would be a mockery if representation were made futile by interference with freedom of choice."[132] Sanctioning recognition based on cards at the expense of free choice, merely to gain immediacy in collective bargaining relationships, makes collective bargaining meaningless. Recognition based on card counts may neither accurately reflect nor adequately protect employees' exercise of their freedom of choice.

D. Significance of Recognition

In both initial organizing and incumbent union situations, an employer's recognition of one of the competing unions may have a significant impact on the employees' ultimate choice of bargaining representative. Recognition prior to an election affords the employer substantial power to manipulate that choice. In the initial organizing context, this may be accomplished by the employer's choice of which union he desires to recognize, the manner in which he bargains with that union, and the timing of recognition. In the incumbent setting, the employer's influence is exerted by the manner in which he bargains with the incumbent.

1. Initial Organizing Setting

In an initial organizing situation, *Bruckner* permits an employer to recognize the one of two rival unions that represents an uncoerced majority

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129. *Id.* at 561. The Board cited to Intalco Aluminum Corp., 169 N.L.R.B. 1034 (1968), *enforced in part and set aside in part,* 417 F.2d 36 (9th Cir. 1969), for the proposition that without a cross-check with the rival union, cards cannot be "an accurate barometer of employees' sentiments." On appeal, however, the Seventh Circuit Court of Appeals ruled that although the better practice would be to obtain the rival union's participation in the card check, failure to do so would not preclude recognition. Playskool, Inc. v. NLRB, 447 F.2d 66, 71 (7th Cir. 1973).

Nevertheless, the Ninth Circuit has required such a cross-check opportunity before enforcing Board orders. *See, e.g.,* Buck Knives, Inc. v. NLRB, 549 F.2d 1319 (9th Cir. 1977) (incumbent union setting); NLRB v. Fishermen's & Allied Workers' Union, 483 F.2d 952 (9th Cir. 1973) (initial organizing setting); Intalco Aluminum Corp. v. NLRB, 417 F.2d 36 (9th Cir. 1969) (initial organizing setting).

One commentator has advocated verification of cards against rival unions' cards as a solution to the dual signatures problem on the theory that it is more likely for a union man to sign two authorization cards than for an anti-union man to sign one. *See* Getman, *supra* note 11, at 303.

130. 301 U.S. 1 (1936).

131. *Id.* at 42.

132. *Id.* at 34.

of employees, until a petition is filed. Because recognition does not bar the filing of a petition by a rival union,[133] it does not completely eliminate the possibility of a contrary employee selection through the election process. The element of timing in granting or refusing recognition, however, is a powerful tool with which an employer, under *Bruckner,* can substantially influence the employees' choice or even effectively destroy the strength of a disfavored union. If the employer favors the union that presents him with the first demand, an early recognition can be made by the employer. This timely recognition may effectively bar the rival union from gaining enough support to file a petition. On the other hand, if an employer dislikes the union that made the first demand, he may refuse that union's request and later recognize a second union that is more to his liking.[134] In either event, the fact that recognition is terminated by the filing of a petition does not eliminate its influential nature.

One commentator has highlighted the very real impact of preelection recognition which may occur in an initial organizing situation.[135] First, employees may believe that the employer favors the recognized union, and thus they might be more inclined to side with that union when they actually vote.[136] Whether the employer actually favors that union is of little consequence; it is the employees' inference, drawn from the act of recognition, which is important.[137] Second, the recognized union may gain a further tactical advantage by acquiring the psychological prestige of being a "winner."[138] This advantage is especially evident when the recognized union was faring well, during prepetition bargaining, in obtaining concessions from the employer.[139] Employees may decide not to forfeit "the bird in the hand"

133. *See* Mojave Elec. Corp., 210 N.L.R.B. 88 (1974) (recognition is no bar to petition when opposing union is actively engaged in organizing) (citing Sound Contractors Ass'n, 162 N.L.R.B. 364 (1966)).

134. This is exactly the scenario which frequently occurred prior to *Midwest Piping,* and which *Midwest Piping* sought to prevent. *See* Bruckner Nursing Home, 262 N.L.R.B. 955, 956 (1982). Getman stated that an employer who makes a timely recognition with intent to manipulate would violate the Act, and that the courts of appeals would probably agree with this view. Getman, *supra* note 11, at 304.

135. *See* Note, *Employer's Duty of Neutrality, supra* note 41.

136. *Id.* at 932.

137. *See, e.g.,* Kaynard v. Cowles Communications, 66 L.R.R.M. (BNA) 2052 (1967). The district court in *Kaynard* recognized this result as being a serious infringement on employee free choice. During the founding of a daily newspaper, the International Typographical Union (ITU) proposed a single union for all employees rather than separate unions for each craft, which was the industry norm. Management collaborated with the ITU, conducting an active campaign aimed at hiring employees who would accept ITU membership. *Id.* at 2059. Prospective employees undoubtedly interpreted the employer's preference as a prerequisite to employment. The court enforced the Board's request for injunctive relief "[i]n view of the irreparable harm which the designated unions may suffer by the drifting away of their membership to the union favored by the employer. . . ." *Id.* at 2067. For a discussion of the inference gleaned from employer dealings with incumbent unions, see *infra* note 150.

138. Note, *Employer's Duty of Neutrality, supra* note 41, at 932.

139. *Id.* at 933. An employer who favors the recognized union might make concessions in order to promote membership in that union prior to an upcoming election. But such conces-

for an unknown union with unknown abilities.[140]

Preelection recognition also aids the employer in obtaining favorable contract terms. Once a collective bargaining agreement exists, the contract bar doctrine precludes the filing of a petition for the life of the agreement, except during a specified period.[141] The recognized union thus has a great incentive to reach such an agreement as quickly as possible, thereby protecting its status as the bargaining representative. This incentive is especially strong when the union fears its rival's organizing abilities. In its haste to conclude a collective bargaining agreement, the recognized union might well make substantial concessions detrimental to the best interests of the employees. Under the prior expanded *Midwest Piping* doctrine, the incentive for hastily reaching an agreement was dissipated by the employer's duty of neutrality, which precluded recognition until an election was held. Thus, prior to *Bruckner,* the *Midwest Piping* doctrine fostered an environment in which collective bargaining efforts were untainted by the inferences and effects of an employer's recognition.[142]

2. *Incumbent Union Setting*

The *RCA* decision imparts great powers of manipulation to employers in an incumbent context as well. Even after a timely petition is filed, *RCA* requires an employer to continue bargaining with the incumbent until the election is held.[143] As a result, employees have a viewing period during which they may monitor the incumbent union's success at the bargaining table before they select their representative by election.[144] Allowing continued recognition after a petition has been filed also bestows an unfair advantage on the incumbent by granting it an exclusive opportunity to obtain a favorable contract.[145] The nonrecognized union has no equivalent opportunity to

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sions may not be inordinately favorable because the employer knows that he is bound by them in the event that the union is certified. *See* Bok, *supra* note 11, at 118.

Recognition may not necessarily work to the advantage of the recognized union either. For example, when the recognized union is not dealing well with the employer, the employees may infer that the rival union will be better able to communicate with the employer and thereby obtain greater benefits. Alternatively, if the employer does not favor any union but chooses to recognize one because he does not want to be subjected to economic pressure, the employer may take a hard line approach during bargaining in an attempt to scare off membership.

140. Note, *Employer's Duty of Neutrality, supra* note 41, at 932.

141. To be timely, petitions must be filed between 90 and 60 days before expiration of a collective bargaining agreement. *See* Retired Persons Pharmacy v. NLRB, 519 F.2d 486 (5th Cir. 1975); Leonard Wholesale Meats, 136 N.L.R.B. 1000, 1001 (1962).

142. *Midwest Piping* achieved this result without imposing an undue burden on the employer. Because elections are generally held within 30 days of the filing of petitions, *see infra* note 152, employers are faced with little delay when recognition is prohibited until that time.

143. RCA Del Caribe, Inc., 262 N.L.R.B. 963, 965 (1982).

144. It is true that employees will already have had an opportunity to observe employer-incumbent negotiations—those resulting in the existing contract. But the injection of a rival union, and the employer's attitude towards that union, into the scenario may render prior bargaining history irrelevant.

145. Unlike initial organizing situations, an incumbent union in a rival situation has no in-

demonstrate to the employees what it might have achieved. The potential for an employer to take advantage of this viewing period by the manner in which he negotiates is great.

Board Member Van de Water, in his dissent in *RCA,* pointed out just how extensive this manipulation can be by asserting that an employer may prefer the rival union over the incumbent.[146] In such a situation, the employer will then engage in hard bargaining in an effort to convince the employees that the incumbent is ineffective, thereby encouraging the employees to shift their support to the rival.[147] Similarly, the potential for manipulation also exists when the employer prefers the incumbent; the employer then may offer substantial concessions during negotiations in the hope of solidifying employee support for the incumbent.[148] Should the rival later win, the employer's grant of favorable concessions is not binding; any benefits gained under the incumbent contract would be forfeited, unless the rival union would be able to negotiate equivalent or better terms.[149] Hence, the employer is in the unique position of either being successful in his choice of union, or being able to avoid whatever concessions he granted the subsequently defeated union. The rival union would likely be defeated, however, due to the favorable inferences drawn from the act of continued bargaining, the manner of negotiations, or the employees' fears that the rival could not obtain equally favorable benefits.[150]

Furthermore, even if the employer does not desire to remove the incum-

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centive to bargain hastily in order to preserve its bargaining representative status; the employer must continue negotiating with the incumbent even after a rival petition is filed. Thus, rather than make unwise concessions, the incumbent will seek victory in the election by bargaining as effectively as possible on behalf of the majority of employees.

146. *RCA,* 262 N.L.R.B. at 968 (Van de Water, Member, dissenting).

147. *Id.* at 967-68 (Van de Water, member, dissenting).

148. *Id.* at 968 (Van de Water, member, dissenting).

149. When the rival union wins an election after the incumbent has obtained benefits through its negotiating efforts, *RCA* may greatly disadvantage the employer by enabling the rival union to start negotiations from the higher floor set by the incumbent's prior negotiations.

150. Some commentators question whether employees will perceive continued bargaining with an incumbent as an employer's statement of preference and, if they do, whether their vote will be influenced accordingly. Getman asserts that continued bargaining with the incumbent is not likely to imply anything more than habit or an employer's sense of duty. Getman, *supra* note 11, at 299-300, 304. Rather, it is more likely that an employer's withdrawal from bargaining with an incumbent will be interpreted as casting disfavor upon the incumbent. *Id.* at 300. Even though Freeman acknowledged the force of Getman's assertions, he also recognized that employer manipulation at the bargaining table can exert undue influence; this possibility justifies the continued application of the prior *Midwest Piping* doctrine. Note, *Employer's Duty of Neutrality, supra* note 41, at 937. Getman counters with the claim that today's employees are sufficiently sophisticated so as not to be easily coerced or influenced by recognition. Getman, *supra* note 11, at 309. Bok goes a step further, viewing negotiations as having little, if any, greater effect on employee choice than an open declaration of employer preference, an avenue open to the employer even before *Bruckner* and *RCA.* Bok, *supra* note 11, at 119 (citing Rheem Mfg. Co., 114 N.L.R.B. 404 (1955)). However, it is more reasonable to think that employees will be better able to evaluate differing union views in an atmosphere untainted by possible inferences of employer preference.

bent, he still may hesitate to execute a contract with that union for fear that negotiations would recommence if the rival union won. As Member Van de Water's dissent noted, requiring continued bargaining with the incumbent in this situation is a "waste of time, and . . . energy . . . which could be of no benefit to the employer, union or employees."[151] In contrast, the expanded *Midwest Piping* doctrine eliminated the viewing period and thereby avoided this possibility of employer manipulation. If the employees ultimately chose to retain the incumbent, the delay in collective bargaining caused by the expanded *Midwest Piping* doctrine was minimal.[152] On the other hand, if the employees selected the rival union as their representative, the doctrine actually expedited the commencement of collective bargaining between the employer and the true employee representative, without the waste of time and energy expended in bargaining with the incumbent.

Recognition without an election effectively undermines employee free choice by affording the employer the power to influence the employees' choice of representative. *Bruckner* and *RCA* render the subsequent election substantially less meaningful, because employees may be reduced to voting based on their perception of the employer's wishes rather than their own preferences. Certainly, this does not comport with the policies expressed in the National Labor Relations Act.

E. Union's Use of Economic Pressure

Although the *Bruckner* and *RCA* decisions adversely affect employee free choice, a significant disadvantage may accrue to employers as well. The financial burden on employers would be substantial if one or both unions could strike, boycott, or picket to force recognition while the employer was under a duty to remain neutral. Recognizing the union that exerts economic pressure would subject the employer to an unfair labor practice charge by the opposing union, while refusing to recognize could lead to serious financial detriment from the economic pressure. The pre-*Bruckner* Board, while recognizing this burden, nonetheless found this use of economic pressure to be protected activity.

In *Hoover Co.*,[153] the employer refused to continue recognition of the

151. *RCA*, 262 N.L.R.B. at 967 (Van de Water, Member, dissenting).

152. Statistics support the contention that, in the majority of cases, the delay involved in awaiting an election is minimal. Elections generally are held within 30 days after the filing of the petition. In the small percentage (17%) of cases when objections to the petitions cause delays, 91% of the delays are less than 60 days (180 days if an appeal is filed). Delays due to unfair labor practice charges are also insignificant; 84% of such charges are dismissed within 30 days, and 80% of the remainder are settled within 180 days. Note, *Employer's Duty of Neutrality*, *supra* note 41, at 934 n.21. Thus, the generally slight delay occasioned by the waiting period before an election produces only slight interference with employee choice and the collective bargaining process. Furthermore, the delay may even provide a measure of additional protection to the employees by affording the opportunity to conduct hearings designed to resolve questions regarding appropriate bargaining units.

153. Hoover Co., 90 N.L.R.B. 1614 (1950), *enforcement denied*, 191 F.2d 380 (6th Cir. 1951). The Board's position in *Hoover* was advocated by several courts before the *Midwest Piping*

incumbent union upon the expiration of the collective bargaining agreement due to the union's failure to comply with certain filing requirements.[154] In response, the union initiated a strike and a consumer boycott in support of its claim for recognition. Seven weeks after the strike began, the employees returned to work, but the employer suspended the strikers because of the continuing boycott. Meanwhile, a second union had filed a petition and won a consent election.[155] The Board held that the employer's suspension of the strikers constituted section 8(a)(3) and section 8(a)(1) violations by finding that the boycott was protected activity.[156] The employer argued that the boycott could not be protected activity because succumbing to its pressure would require him to violate the *Midwest Piping* doctrine, and thus the Act. This position was rejected by the Board, which stated that such a violation was not a certainty.[157]

In denying enforcement of the Board's order, the Sixth Circuit in *Hoover* found the boycott to be unlawful activity in "direct interference with the Board's election procedures and with the right of employees to select bargaining representatives of their own choosing."[158] Endorsing the duty of neutrality, the court found the union guilty of an unlawful act because it was forcing the employer to violate the National Labor Relations Act.[159]

Under the *Midwest Piping* doctrine as modified by *Bruckner,* there is a greater possibility that an employer may be faced with actual and substantial economic pressure prior to the filing of a petition. Because *Bruckner* does not require recognition, but merely permits it, an employer may rightfully withhold recognition from either union and be subjected to the resul-

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decision. As one court stated, "economic hardships imposed upon an employer as a result of jurisdictional labor disputes do not excuse the employer from compliance with the Act." NLRB v. Engelhorn & Sons, 134 F.2d 553, 557-58 (3d Cir. 1943) (quoting NLRB v. Hudson Motor Car Co., 128 F.2d 528 (6th Cir. 1942)).

154. *Hoover,* 90 N.L.R.B. at 1615. The filing requirements have since been deleted from § 9 of the Act. *See* Labor-Management Reporting and Disclosure Act of 1959, § 201(d), 29 U.S.C. § 431 (1976) (repealing National Labor Relations Act § 9, 29 U.S.C. § 159(h)).

155. Because the incumbent did not comply with filing requirements it could not be placed on the ballot. *See supra* note 154.

156. *Hoover,* 90 N.L.R.B. at 1619.

157. The employer based his contention on the Board's rulings in Thompson Prods., Inc., 72 N.L.R.B. 886 (1947), and American News Co., 55 N.L.R.B. 1302 (1944), which found strike activity unprotected when its object was to cause, with certainty, a violation of labor law by an employer. The Board distinguished those cases from *Hoover* by stating that the *Hoover* situation did not involve a "certain" violation of the *Midwest Piping* doctrine. It noted that there was a chance that a question concerning representation would no longer exist by the time the employer recognized one union; the rival might withdraw its petition, or the employer might grant "members only" contracts. 90 N.L.R.B. at 1618.

158. Hoover Co. v. NLRB, 191 F.2d 380, 386 (6th Cir. 1951).

159. *Id.* The Second Circuit reached a result similar to that in *Hoover. See* NLRB v. Electronics Equip. Co., 205 F.2d 296 (2d Cir. 1953). At issue in *Electronics Equipment* was the sending of certain letters soliciting a boycott in the event of a strike. The Board had found the activity to have the unlawful objective of obtaining an exclusive bargaining contract for the union during the pendency of a representation petition. Thus, the court found no § (8)(a)(3) violation when the employer discharged the employees who sent the letters. *Id.*

tant economic pressure.[160] Under those circumstances, exertion of economic pressure by the union is lawful; it does not have the objective of compelling the employer to violate the Act. Consequently, the courts will sustain Board orders in the event of employer appeals. Therefore, employers faced with such economic pressure can no longer look to the courts to alleviate that burden. In contrast, under the prior *Midwest Piping* doctrine, employer appeals for judicial relief were more successful. Although a pre-*Bruckner* employer also faced the burden of a lengthy and expensive appeals process, plus the union's economic pressure while the appeal was pending,[161] the burden imposed by the *Bruckner* decision is considerably greater. Therefore, because the Board no longer requires neutrality in initial organizing situations when no petition has been filed, economic pressure increases the potential burden on employers.

Unfortunately, while the Supreme Court has considered the use of such economic pressure in a single union setting,[162] it has not settled the issue in a *Midwest Piping* context.[163] Thus, after *Bruckner,* the Board and the courts of appeals remain in conflict as to the lawfulness of union economic pressure after a petition is filed in an initial organizing situation.[164]

In contrast, the *RCA* decision serves to lessen the potential burden on employers in rival union settings when an incumbent union is functioning. Prior to *RCA,* the Board would allow a rival union to use economic pressure to protest an employer's signing of a contract with an incumbent union. Such activity on the part of the rival union would have been protected by the Board as a reaction to an unfair labor practice, because the employer would

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160. A noncertified union may lawfully picket for up to 30 days before it is required to file a petition. National Labor Relations Act § 8(b)(7)(C), 29 U.S.C. § 158 (1976). Once a petition is filed, the duty of neutrality comes into play. Bruckner Nursing Home, 262 N.L.R.B. 955, 957 (1982).

161. Two deterrents might diminish even the lesser burden associated with the prior *Midwest Piping* doctrine. First, an employer may permanently replace employees participating in an economic strike. *See* NLRB v. MacKay Radio and Tel. Co., 304 U.S. 333 (1938). Economic strikes include those instituted in support of bargaining demands or requests for recognition. R. GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 339 (1976). Second, union awareness that courts would find activity which pressured an employer to violate the Act unlawful may well constitute an effective deterrent, so as to avoid the economic pressure in the first place.

162. *See, e.g.,* Linden Lumber Div. v. NLRB, 419 U.S. 301 (1974). *Linden Lumber* involved a single union setting, in which the union struck the employer after it was refused recognition, despite presentation of a card majority. The Court did not hold the strike to be unlawful, but neither did it find a § 8(a)(5) violation by the employer. *Id.* at 309-10.

163. In Ohio Ferro-Alloys Corp. v. NLRB, 213 F.2d 646 (6th Cir. 1954), the Sixth Circuit adhered to its earlier decision and found a recognitional strike and associated picketing in a rival union context to be illegal activity. *Id.* at 651. Nevertheless, the Board reaffirmed its *Hoover* position as recently as 1978. *See* St. Regis Paper Co., 232 N.L.R.B. 1156 (1978).

164. The Board-court conflict may be exacerbated if the issue arises in a circuit which holds that a petition will not establish a real question concerning representation if there is clear proof of majority support. If the picketing union demonstrates majority support, a court in such a circuit may find the pressure to be lawful. Conversely, if the union does not demonstrate majority support, the picketing would probably be held to be unlawful.

have violated the *Midwest Piping* doctrine by negotiating with the incumbent in the face of a rival petition.[165] By requiring continued bargaining with incumbent unions, however, the *RCA* Board effectively eliminated this use of economic pressure. Employers will not commit an unfair labor practice by bargaining with the incumbent; consequently, any economic protest by the rival union will not be protected.

CONCLUSION

By limiting the *Midwest Piping* doctrine, the *Bruckner* Board failed to adequately protect employee free choice. The elimination of the duty of neutrality when an employer is aware of rival unions' organizational activities, but no petition has yet been filed, affords the employer a powerful tool with which to manipulate the choice of representation. Similarly, *RCA,* by mandating continued bargaining with the incumbent, provides the employer an equally clear opportunity to influence his employees' decision. A return to the expanded *Midwest Piping* doctrine is clearly needed. Any slight delay which that doctrine might entail in bringing about a meaningful labor-management relationship will not threaten industrial stability sufficiently to warrant interference with employees' free choice.

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165. *See, e.g.*, Suburban Transit Corp., 203 N.L.R.B. 465, 471 (1973). The court of appeals, on the other hand, thought that the petition did not create a real question concerning representation in light of the fact that the incumbent demonstrated a clear showing of majority support, and thus did not trigger the employer's duty of neutrality. Accordingly, the court deemed the signing of the contract lawful. Suburban Transit Corp. v. NLRB, 499 F.2d 78, 82-83 (3rd Cir. 1974).